

EXHIBIT B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FRONTIER AIRLINES, INC.,

Plaintiff,

v.

22 Civ. 2943 (PAE)

CARLYLE AVIATIONS MANAGEMENT
LIMITED, et al,

Defendants.

Telephone Conference

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New York, N.Y.

June 8, 2023

3:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

BINDER & SCHWARTZ, LLP
Attorneys for Plaintiff

BY: ERIC FISHER
GREGORY PRUDEN

-And-

LANE POWELL, PC
Attorneys for Plaintiff

BY: DAVID SCHOEGGL

MILBANK, LLP
Attorneys for Defendants

BY: JED SCHWARTZ
SAMANTHA LOVIN
EMILY WERKMANN

-And-

CLIFFORD CHANCE US, LLP
Attorneys for Defendants

JEFF E. BUTLER
JOHN P. ALEXANDER

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1 THE COURT: I'm calling the case of *Frontier Aviation*
2 *v. AMCK Aviation Holdings, et al*, 22 Civil 2943.

3 For Frontier, I'm just going to go in order, do I have
4 Eric Fisher on the line?

5 MR. FISHER: Yes, I'm here, your Honor.

6 THE COURT: Do I have Gregory Pruden on the line?

7 MR. PRUDEN: Yes, your Honor. Good afternoon.

8 THE COURT: And do I have David Schoeggl on the line?

9 MR. SCHOEGGL: Yes, your Honor. Good afternoon.

10 THE COURT: Mr. Fisher, I understand from my law clerk
11 that you will be taking the lead for the plaintiff today?

12 MR. FISHER: That is correct.

13 THE COURT: For the defendants, I understand there are
14 five lawyers in two different categories. Is Jed Schwartz on
15 the line?

16 MR. SCHWARTZ: Yes. Good afternoon, your Honor.

17 THE COURT: Good afternoon. Is Samantha Lovin on the
18 line?

19 MS. LOVIN: Yes, your Honor.

20 THE COURT: Good afternoon. And is Emily Werkmann on
21 the line?

22 MS. WERKMANN: Yes, your Honor. Good afternoon.

23 THE COURT: Good afternoon. Before moving farther,
24 Mr. Schwartz, I understand that the three of you whose names I
25 just mentioned represent Wells Fargo and UMB in the related

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1 case that I accepted yesterday; but more relevant now for the
2 purposes of the existing case's docket number I read a moment
3 ago, I take it that for today's purposes you are representing
4 those same two defendants?

5 MR. SCHWARTZ: That's correct, your Honor.

6 THE COURT: Are you also representing Carlyle?

7 MR. SCHWARTZ: Yes, I am. Although, I don't know that
8 we filed a notice of appearance for Carlyle because I don't
9 think Carlyle was subject to the order to show cause.

10 THE COURT: No sweat. That's not a problem. But I
11 just wanted to make sure, as I understood from my law clerk,
12 that you would be speaking for the defense today; that to the
13 extent that there are, if you will, Carlyle-focused questions,
14 you are empowered to represent them on this call?

15 MR. SCHWARTZ: Yes, your Honor.

16 THE COURT: Moving on. Is Jeff Butler on the line?

17 MR. BUTLER: Yes, your Honor. Good afternoon.

18 THE COURT: Good afternoon. And is John Alexander on
19 the line?

20 MR. ALEXANDER: Yes, your Honor. Good afternoon.

21 THE COURT: Good afternoon. And, Mr. Butler, I
22 understand that you and Mr. Alexander, who are from the
23 Clifford Chance firm, represent and have long-represented all
24 the named defendants in this case. Is that correct?

25 MR. BUTLER: Correct.

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1 THE COURT: Okay. Very good. Let me begin with just
2 a few housekeeping notes. To begin with big picture, I just
3 want to thank all counsel for very, very able briefing
4 accomplished in an extremely accelerated time period, so thank
5 you for that. It's always worth acknowledging high quality.
6 And I'll ask the lead counsel on the line as well to please
7 make a point of thanking and acknowledging the junior members
8 of the team, who particularly in the case of the defense, may
9 well have had very late nights last night, and I don't want
10 their hard work to go un-acknowledged, so please let them know
11 that the Court is grateful for all that.

12 Second of all, there's a motion at Dkt. 65 by the
13 plaintiff to seal Exhibit 3, which I understand to be the
14 framework of the agreement. I will grant the motion to seal,
15 of course that's without prejudice to the right of any party to
16 ask me to revisit it down the road. But for the purpose of
17 effectively the emergency hearing today, it is of course
18 sensible to err on the side of care, so I'm going to grant that
19 motion without prejudice. I next want to explain why we're
20 doing this by phone. I have a very, very strong view that
21 hearings should be in person unless they are strictly
22 logistical and mechanical, and this is substantive. The reason
23 we're doing it by phone is that Frontier's request for
24 emergency came in literally as I was about an hour from leaving
25 my chambers yesterday to go to an out-of-state judicial

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1 conference committee meeting where I am today and where I will
2 be tomorrow. As a result, the only way for you to get a claim
3 on my time was for me to do this telephonically. And the only
4 time available I had was the window of time when my committee
5 was not sitting. So I felt I owed you an explanation for why
6 we're doing this the second best way, which is by phone.
7 That's the reason why. And I made the judgment given my
8 familiarity with the case, including on account of the motion
9 to dismiss decision, which coincidentally was getting ready for
10 issuance yesterday when the request for emergency relief came
11 in, it made far more sense for me to take this by phone than
12 for another judge, likely the Part One judge who would be
13 unfamiliar with these proceedings to take it up if possible at
14 all in person. And obviously given the content sensitivity
15 stated, it was not viable to put this off until next week.

16 As to mechanics for this call. I learned this
17 repeatedly during the pandemic when so much was done remotely.
18 Do not interrupt. I will call on each side to speak, and I will
19 give everyone an opportunity to do so, but do not interrupt.
20 It's impossible for me to follow the overlapping voices. More
21 important, it's impossible for the court reporter to talk. If
22 you hear me speaking, because I may try to cut in to follow-up
23 on something that a lawyer is saying, please stop speaking. So
24 if you hear that, I appreciate it. Please speak a little more
25 slowly than usual also just given the telephonic format's

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1 limitations. It is not out of the question you may hear my law
2 clerk speak up, and if so it maybe because I have emailed her
3 because I've gotten disconnected. So if you hear my law clerk
4 speaking, please immediately silence yourself. This means
5 almost certainly that I'm off the line and we're going to have
6 to circle back when I can get back on the line. I'm hearing
7 good acoustics right now, but stranger things have happened.

8 So having taken care of those preliminaries, I've read
9 both sides' briefs as you can tell, and I want to begin with
10 plaintiff, with you Mr. Fisher. And I want to begin with a
11 tight focus on irreparable harm and balance of the equities.
12 So for the time being, put aside merits issues and let's just
13 focus on irreparable harm. The defense says in effect that
14 were Frontier to be denied usage effectively of the 14 planes,
15 that is a surmountable problem in effect because Frontier has
16 many multiple planes. Walk me through from your perspective
17 concretely what would happen if Frontier were to be unable to
18 use the 14 planes.

19 MR. FISHER: Sure, your Honor. Eric Fisher for
20 Frontier Airlines. And thank you, your Honor, for making
21 yourself available on such short notice for this hearing,
22 particularly given that your Honor is out of state.

23 As set forth in the Power Diamond declaration, if
24 Carlyle exercises the remedies that it claims it's entitled to
25 exercise, it would be entitled to do so already on Saturday, at

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1 least as to 13 of the 14 aircraft. And the irreparable harm to
2 Frontier, your Honor, is that this could effect up to 10
3 percent of Frontier's entire fleet. It would mean the
4 grounding of 10 percent of the fleet, which as set forth in
5 that same declaration means up to 12,000 passengers per day
6 could be effected. As a result, since Frontier is a commercial
7 airline and its entire business is commercial flight, it would
8 cause irreparable harm to Frontier's good will in a way that
9 could not possibly be quantified with money damages, not to
10 mention the havoc it would wreak for all of those passengers
11 affected by the impoundment or grounding of those aircraft.

12 THE COURT: Pause there. I have no doubt that if one
13 starts from the premise that 12,000 passengers wouldn't be able
14 to make their planes, that what you say is correct. It's the
15 premise that leads there that I'm trying to pushback on. How
16 big is the fleet? Let me go step by step here. How big is the
17 fleet?

18 MR. FISHER: Just a moment, your Honor.

19 THE COURT: You said it's up to 10 percent, so I'm
20 assuming the fleet is about 140. You tell me.

21 MR. FISHER: Yes, it's 127 commercial passenger
22 aircraft, your Honor.

23 THE COURT: On any given day, how many of them are in
24 the air?

25 MR. FISHER: I don't know the answer to that question,

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1 your Honor.

2 THE COURT: Sorry, somebody's interrupting. Let me
3 just stay with Mr. Fisher. I ask that there not be an
4 interruption. Mr. Fisher, sticking with you. Look, I'm trying
5 to understand this. If what you're saying is, if you can
6 explain to me granularly why it is that taking 13 or 14 out of
7 127 effectively means that flights get shut down, I'm open to
8 hearing that. It's not unintuitive. It's entirely plausible
9 that's the case. I can't take a conclusory statement like that
10 without burying underneath to understand why that is so. Is it
11 the case that essentially the fleet is so -- the capacity is so
12 thoroughly used each day that there isn't play in the joints if
13 13 or 14 planes were snowed in or something like that. Explain
14 to me why what you're saying is true.

15 MR. FISHER: Right, your Honor. So the declaration
16 that was submitted, it's from the corporate senior vice
17 president and general counsel of Frontier Alliance. And I
18 believe, your Honor, it is exactly as you suggested which is
19 that the fleet is so tight; that to take 10 percent of the
20 aircraft out of commission means that 10 percent of the daily
21 flights will be disrupted.

22 Your Honor, the interruption that you heard is
23 actually my co-counsel from Lane Powell David Schoeggl, and
24 Mr. Schoeggl has represented Frontier Airlines for many years
25 in many different areas. And if your Honor will indulge, I

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1 might want to just defer to him for the specific answer to your
2 Honor's question about the flights.

3 THE COURT: Fair enough. Mr. Schoeggl, in the future,
4 don't do that. You can send an email to Mr. Fisher if you need
5 to. I literally 60 seconds before told you not to do that.
6 Now, Mr. Schoeggl, that being said, you may well be the right
7 person to answer the question. Mr. Fisher has handed the baton
8 to you. Mr. Schoeggl, just focusing on the specific mechanical
9 question, Why is it that grounding indefinitely 10 percent of
10 the fleet would create the disruption that Mr. Fisher
11 described?

12 MR. SCHOEGGL: And I apologize for violating the
13 Court's rule in the first minute, and I promise I won't do it
14 again. Your Honor, typically Frontier would have one to two
15 spare airplanes at one of its headquarters locations that can
16 be used in the event of mechanical breakdown. About half the
17 time I believe those sparer planes are used because of other
18 airplanes that have mechanical problems, so there's essentially
19 no flexibility to substitute other aircraft. There are usually
20 five to 10 percent of the airplanes of 127 that are down for
21 maintenance. It's sometimes possible to bring those back for
22 maintenance early, but usually not because right now the
23 maintenance schedules are very tight. And if anything, they
24 have more airplanes in maintenance than scheduled rather than
25 less. So my understanding is that there is essentially no

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1 excess capacity in general. On certain given days, it's
2 possible to free up airplanes to do just a few additional
3 flights per day. But the vast majority if not all of the
4 flights done by these 14 airplanes would simply have to be
5 canceled.

6 THE COURT: Okay. Let me ask you this question,
7 Mr. Schoeggl. First of all, I take it what you just proffered
8 to me is based on the familiarity with a longstanding client?

9 MR. SCHOEGGL: That is correct. I'm not testifying to
10 fact, but that is my understanding that we could verify with a
11 subsequent declaration.

12 THE COURT: Let me continue on with you then just for
13 a moment. Let's suppose just for argument sake that there came
14 a point in which Frontier was shown on the merits to not have
15 an entitlement to the planes, which is a bore way of saying,
16 suppose you lose this case; or there comes some point at which,
17 at whatever stage in the proceeding, whoever the decider is,
18 court or jury, says, you lose. Planes are out of here. You
19 can't use them anymore. How long does it take for Frontier to
20 adapt to that? Presumably, you've got a back-up plan, what is
21 it?

22 MR. SCHOEGGL: Well, your Honor, to get other
23 airplanes in, especially given the tight market conditions, it
24 would be weeks or months. And we do have a back-up plan. The
25 back-up plan is based on the remedies that the plaintiffs are

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1 seeking, and the reason they're seeking the remedy. I'm sorry.
2 I said plaintiffs. The remedies that the defendants are
3 seeking. Essentially, they want Frontier to agree to
4 conditions that we believe would impair Frontier's rights. And
5 so if we're not able to guarantee that we'll have use of the
6 airplanes, we'll simply have to agree to the conditions and
7 give up our rights, because it would be so devastating as a
8 company to lose the airplanes that we just can't risk that.

9 THE COURT: In other words, let me see if I've got
10 this right. For you, the alternative to "winning" is a loss in
11 which you accede to the conditions you contend are
12 extra-contractual, such that you can still use the planes, just
13 under conditions you regard as contractually wrong?

14 MR. SCHOEGGL: That's correct, your Honor. And it's
15 the case within an airline such as Frontier -- oh, sorry.

16 THE COURT: In other words, do you have a back-up plan
17 under which if for some reason events un-spooled in a different
18 way in which you not only lost, but the nature of the lost
19 meant that the defendants were able to go a separate direction
20 with the planes, just indulge the hypothetical, what would
21 Frontier do?

22 MR. SCHOEGGL: Well, first, your Honor, I think -- and
23 I think even the lessor's counsel would agree to this that that
24 would just be unprecedented in the aircraft leasing market.
25 And I think it would tarnish the lessor's reputation so badly

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1 that they would be drummed out of the marketplace so they would
2 never do that. But assuming that it were, we would have to
3 simply cancel all the flights scheduled for these 14 airplanes
4 until we could bring substitutes online, which depending on
5 market conditions can range from a few weeks to a few months.

6 THE COURT: All right. Thank you, Mr. Schoeggl. I'm
7 going to go back to Mr. Fisher now. Thank you though. That was
8 helpful. Mr. Fisher, let me come back though I'm still focusing
9 on irreparable harm this question. If ultimately Mr. Schoeggl
10 is right and that one way or the other Frontier is going to get
11 access to these planes, it's just a question of whether it has
12 to do so on terms that it doesn't like and that it believes are
13 not contractually authorized. Why is Frontier's acceding to
14 contractually unauthorized terms than something that does it
15 irreparable as opposed to irreparable harm?

16 MR. FISHER: Your Honor, at bottom the lease rights
17 that are being harmed by the terms that Carlyle is trying to
18 pose upon us here go to the very heart of our leasehold
19 interest in these aircraft, and our ability to rely on that
20 leasehold interest to recover any money whatsoever with respect
21 to the pending litigation.

22 THE COURT: I don't understand. You're going to need
23 to explain that. Do it again. It is conclusory -- and maybe I
24 just don't understand the dispute well-enough. But you're
25 contending that certain assignments are impermissible. On the

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1 other hand, your co-counsel says, you still get to use the
2 planes, it's just that the ownership or whatnot would be
3 assigned to somebody else. Why is it that the assignment -- if
4 it's not ultimately the use of the plane, but it's the
5 assignment that's at issue, which is what Mr. Schoeggl says,
6 how come that is something that does an irreparable harm to
7 you? We can litigate that here. And if the assignment turned
8 out to be ultra vires, wind it back again or something. But if
9 you at all times, as Mr. Schoeggl says, been able to use the
10 plane, where's the irreparable harm?

11 MR. FISHER: Your Honor, it's somewhat circular.
12 We're only entitled to use the plane if we agree to the terms
13 that have been presented for the transfer of these aircraft.
14 And the effect of that transfer would mean that there'd now be
15 a third-party transferee, who would be the owner of the
16 aircraft. And in any situation where we recover money damages,
17 we would not be able to, or at risk at least of not being able
18 to enforce that judgment against our leasehold interest in the
19 aircraft because that third-party transferee would claim that
20 it is the owner of the aircraft, not any of the defendants in
21 the lawsuit.

22 THE COURT: So, wait. I think what you're saying to
23 me is that your ability to get money damages would be -- let me
24 back up. I think what you're saying to me is that if you
25 accede to the transfer while challenging it in court, and

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1 ultimately are harmed in someway, you're less likely to recover
2 money damages from the transferee than from the current owners?

3 MR. FISHER: Not only less likely, we arguably would
4 not have any claim against that third-party transferee because
5 the ownership interest in the aircraft would have been
6 transferred, and I don't think that that's something that could
7 be unwound, your Honor.

8 THE COURT: In other words, your theory is you're
9 entitled to block if you will -- my words here, the transfer of
10 ownership. And the fact that the new owner would be somebody
11 else is doing you harm because why? I'm just trying to
12 understand. Look, in other words, let's suppose for argument
13 sake the agreement was crystal clear that you have a right to
14 veto a change of ownership, just assume correctness on the
15 merits. And let's suppose that the defendants breach by in
16 face of that effecting such a transfer. The injury to you from
17 that is no doubt a contract breach on my hypothetical facts,
18 but what's the practical injury to you, and what remedy would
19 you seek from it?

20 MR. FISHER: The injury would be a total inability
21 potentially, your Honor, to collect on that judgment. And to
22 be clear, I understand that if the defendants' characterization
23 that we're trying to block the transfer, but really what has
24 precipitated this emergency, which did not need to be an
25 emergency, was that we were in the course of negotiating the

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1 terms of the transfer. And we were trying to negotiate an
2 arrangement that would provide us with sufficient security so
3 that we were not contracting away our potential judgment
4 enforcement rights.

5 THE COURT: Look, I'm focusing on irreparable harm.
6 So suppose it's a breach to transfer the ownership and you
7 prevail in a later lawsuit on that, what does relief look like
8 for that? Does it look like monetary damages or something
9 else?

10 MR. FISHER: The rights that we are trying to protect
11 here is the bundle of our economic rights under the lease,
12 which would be impaired by the transfers if they're done
13 according to the terms that Carlyle has proposed here.

14 THE COURT: But is your point that whatever you're
15 getting by having a say in the ownership is not quantifiable?
16 In other words, you really prefer the current owners -- and
17 I'll probe this in a moment -- but for some reason the proposed
18 or the successor owners are sufficiently problematic or
19 second-rate, but not in a way that can be quantified, that
20 there's some intangible injury to you? I'm just trying to get
21 it better.

22 MR. FISHER: I appreciate, your Honor, that you're
23 asking these questions in the context of irreparable harm, but
24 I think that it does spill over into the question of the merits
25 of the case and success on the merits. We should not be

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1 required to consent to transfers under threat of having 10
2 percent of our fleet grounded when those transfers violate the
3 lease provisions.

4 THE COURT: Right. I'm trying to understand -- let me
5 try it this way. Why did that provision about who the owner
6 was and consent to the owner, why did it matter to your client?

7 MR. FISHER: Because one of the most valuable rights
8 that we have -- in a situation where, for example, we get a
9 judgment in what's been called lawsuit number one, the case
10 pending before Judge Stanton under the framework agreement. We
11 know we have alleged in the complaint in the action before your
12 Honor that the original owner of the aircraft, AMCK Holdings,
13 does not have any assets anymore, and has essentially through
14 the Carlyle transactions rendered itself judgment proof, which
15 is what of course prompted us to file this second lawsuit
16 before your Honor.

17 If we get a judgment in that first lawsuit, we know we
18 can't enforce it, and we can't collect against AMCK Holdings.
19 They don't have any assets anymore. And then if we tried to
20 collect in the way that would be most typical by taking
21 advantage of the fact that we have a property interest in the
22 aircraft through our lease, the new owner of the aircraft would
23 say, well, you can't enforce that against us because we had
24 nothing whatsoever to do with either of the two litigations.
25 And that's the harm, your Honor, that we're trying to protect

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1 against here.

2 THE COURT: Is there incremental risk to you? If the
3 ownership is transferred of your lost of control of the
4 aircraft where we started this irreparable harm discussion; or
5 is the sole harm that you might not have any party against whom
6 you have a viable claim that still has money?

7 MR. FISHER: To my knowledge, your Honor, it's the
8 latter. It's that we would have an uncollectible judgment, and
9 the defendants here would have effectively succeeded in what we
10 claim to be their scheme of rendering AMCK Holdings judgment
11 proof, and then further interfering with our rights to ever
12 collect in that lawsuit.

13 THE COURT: And what would the amount of the judgment
14 if you will be in that circumstance? How would one assess it?

15 MR. FISHER: So, your Honor, I'm not counsel in
16 lawsuit number one, but my understanding is that damages there
17 if we succeed in proving them are in the neighborhood of \$60
18 million.

19 THE COURT: OK. There's been some red made in the
20 course of the negotiations that would implicate your ability to
21 continue to use the planes. I take it that if you don't
22 consent to what you contend to be an illegal transfer, you will
23 be denied the use of the plane. That's where the use of the
24 plane comes in. Is that right, Mr. Fisher?

25 MR. FISHER: Yes, that's exactly right, your Honor.

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1 THE COURT: Because the planes do ultimately get
2 implicated because the price from your perspective of your
3 refusal to accede to a contract breach is real irreparable harm
4 which is access to the plane. If that's the case, unpack for
5 me slowly the context in which the threat to yank the planes
6 from Frontier's control occurred.

7 MR. FISHER: Sure. Your Honor, there have been
8 ongoing negotiations with the Carlyle party to transfer these
9 aircraft to this third-party. And those negotiations are
10 described in the declaration of Paul Lambert. In essence,
11 we -- and defendants in their opposition papers filed this
12 morning include examples of two red lines which are indicative
13 of the substance of the negotiations. We at Frontier have been
14 trying to get to "yes" with Carlyle. And getting to "yes" for
15 us means assuring that these transfers do not impair rights
16 that we have under the leases. And so currently we have --

17 THE COURT: Pause. Mr. Fisher, for some reason you
18 are fading out a little bit on the phone, so maybe speak louder
19 but closer to whatever phone you're using. Go ahead.

20 MR. FISHER: Of course. Sorry about that. We have
21 been negotiating over the circumstances of the transfer, and
22 the exhibits to the declarations, including the red line
23 submitted by the defendants indicates that we have been
24 speaking to put ourselves in a position that would be similar
25 to our rights under the lease if the transfer had not occurred.

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1 And chiefly the negotiations broke down over the question of
2 securing our interest in the aircraft. Carlyle proposed a \$60
3 million guarantee in connection with the transfer, but Carlyle
4 was unwilling to offer us a kind of assurance that the
5 guarantor entity would itself have sufficient assets to meet
6 the guarantee. And so we engaged in negotiations to try to get
7 that guarantee secured, for example, by the posting of a letter
8 of credit.

9 While those negotiations were occurring, we were
10 served with the notices of default on May 26. And those, your
11 Honor, notices of default are of course the immediate reason
12 that we're before the Court today, because 15 days after their
13 service, Carlyle is entitled to -- claims it's entitled to
14 pursue drastic remedies under the lease which include grounding
15 the aircraft, cancellation of the leases, impoundment of the
16 aircraft and so on.

17 THE COURT: Your point -- OK. Thank you. That unpacks
18 it better for me. It's that in effect Carlyle is holding over
19 you, your client, the threat ultimately of grounding as a lever
20 to get you to consent to something that you believe you're not
21 contractually obliged to consent to. That's the short of it?

22 MR. FISHER: That is the short of it, your Honor. And
23 just a few very quick points on that. Carlyle, as you now know
24 because of their renewed action which you've accepted as a
25 related case, jumped the gun and suited up in state court with

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1 respect to these notices of default even before the cure period
2 that we're entitled to under the lease expired. Before coming
3 to your Honor with this emergency relief, we asked Carlyle to
4 temporarily agree to refrain from exercising the most drastic
5 of these remedies so that all the parties could have some more
6 space to try to work this out to everyone's satisfaction. They
7 refused. And all of that is what --

8 THE COURT: Who from Carlyle -- I want a name --
9 refused to refrain from exercising the remedies that go to the
10 aircraft?

11 MR. FISHER: So, your Honor, this was a communication
12 I have. This was between counsel.

13 THE COURT: I want a name. I want to know who said
14 that to you.

15 MR. FISHER: Oh, sure. It was in email communications
16 with Mr. Schwartz and Mr. Butler.

17 THE COURT: One of them you're saying in an email
18 declined to give you ironclad protection against the grounding
19 if you will of the airplanes?

20 MR. FISHER: Exactly, yes, absolutely.

21 THE COURT: From your perspective if you had that
22 protection, the irreparable harm I take it would go away during
23 the pendency of the contract negotiations?

24 MR. FISHER: It would, your Honor. And also to be
25 clear, we've tried to tailor the relief here, the injunctive

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1 relief narrowly to only enjoin Carlyle from pursuing the most
2 drastic of these remedies, which are the remedies that would
3 cause us irreparable harm. Carlyle, if they think that they're
4 right about these notices of default, not only are they free to
5 pursue money damages, they have already in these lawsuits that
6 they filed in state cause. So no one is trying to prevent them
7 from getting damages in contract remedies.

8 THE COURT: Let me turn to the balance of the equities
9 just for a second with you, Mr. Fisher. Suppose you're wrong
10 about this. Suppose that I grant the relief that you're
11 seeking, and it turns out that your read of the contract rights
12 is proven to be wrong, what is the damages verdict against your
13 client look like?

14 MR. FISHER: Well, your Honor, I think that the
15 damages have not yet been quantified, but they are
16 relatively -- considering that this is a complicated commercial
17 dispute, but they are relatively small because I believe that
18 the damages would simply be the delay that Carlyle experienced
19 in transferring these assets during the period of time when
20 they were enjoined from going forward with the impoundment of
21 the aircraft, which of course we could never tolerate and we
22 would have to accede to their terms.

23 THE COURT: What does Frontier's balance sheet look
24 like? How much does it have an ability to pay assuming a worst
25 case scenario?

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1 MR. FISHER: Your Honor, based upon the numbers that
2 I've seen in the state court complaint, and certainly the
3 numbers in the opposition brief this morning suggesting that
4 damages could be in the neighborhood of \$2 million, Frontier is
5 a judgment-worthy party effort I think any amount of damages
6 that's at issue here.

7 THE COURT: Okay. So may I assume then that to the
8 extent that a bond is a component of relief that is sought,
9 posting a \$2 million bond, which I took from my review to be
10 what was floated, that would not present a problem? You could
11 do it?

12 MR. FISHER: Yes, that's right, your Honor. But I
13 think that the amount of the bond was stated in a conclusory
14 way, and the defendants themselves acknowledge that there
15 wasn't much backup to support the computation of that amount.

16 THE COURT: No doubt that's because you filed this
17 yesterday, and the reclaiming of the plane could take place on
18 Saturday. It's hard to fault it. Defendants were operating
19 under a severe time done at my hand. So at some level, I have
20 to give them some slack as to the backup for the \$2 million.
21 It doesn't sound like you're contending. You may disagree, but
22 it doesn't sound like it's an outlandish proffer.

23 MR. FISHER: Your Honor, yes, and I certainly
24 wasn't -- I didn't mean to blame them for the lack of backup,
25 but merely to reserve my right on behalf of Frontier to contest

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1 the amount once there's more information.

2 THE COURT: Let me try it this way, Mr. Fisher. Given
3 the speed with which events have developed, the most you're
4 going to get out of a hearing today is going to be a TRO, which
5 would then result in a fuller more flushed out hearing within
6 the 14-day period for which a TRO is ordinarily authorized.
7 And so the issue really would be as to a bond. If you're
8 seeking the relief you're seeking, I'm assuming you're willing
9 to put up a \$2 million bond, understanding that if it somehow
10 it hasn't resolved itself by the end of that period, and we
11 have to turn to converting the TRO or modifying the TRO, but in
12 someway becoming a PI; you at that point, everyone would have
13 an opportunity to do the math and address more rigorously the
14 amount of a bond if there were to be longer term relief.

15 But I think where I'm trying to go just to move on in
16 the conversation is, for the purposes of the temporary relief
17 you're seeking, without conceding anything, you're not
18 resisting the idea that \$2 million is within the realm of the
19 reasonable?

20 MR. FISHER: Your Honor, to be direct, I'm certainly
21 not contesting that Frontier could post a bond in that amount.
22 In light of your Honor's clarification, we're simply saying
23 that that seems to be a high bond amount if we're talking about
24 up to two weeks.

25 THE COURT: Okay. Fair enough. I want to turn to the

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1 defense because the heart of this to me -- I read enough about
2 the merits to get a sense of it. I may or may not come back to
3 that, but I really want to focus on irreparable harm.

4 Mr. Schwartz, I'm going to turn the floor to you. Yes
5 or no, did somebody affiliated with the defendants raise the
6 specter in any way inhibiting Frontier's use of the airplanes?

7 MR. SCHWARTZ: Your Honor, if the question is did
8 Mr. Fisher ask if we would agree to defer the remedy of
9 grounding or repossessing the aircraft --

10 THE COURT: No, the question is what I asked you. Did
11 you in any way, anyone from your side in any way say anything
12 suggesting that the defendants might interfere in any way with
13 Frontier's access to the airplanes?

14 MR. SCHWARTZ: No, your Honor.

15 THE COURT: Are you promising on behalf of all the
16 defendants that between now and the next 14 days you will do
17 nothing that in any way interferes with Frontier's use of the
18 aircraft?

19 MR. SCHWARTZ: Your Honor, I don't have the authority
20 to make that promise today.

21 THE COURT: Just to be clear, yes or no, does the risk
22 hang over Frontier that one of the defendants in this case
23 could take action that compromises its ability to use the
24 aircraft?

25 MR. SCHWARTZ: Yes, your Honor.

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1 THE COURT: How would that work? Look, I don't mean
2 to be difficult, but the heart of the irreparable harm issue
3 here concerns Frontier in its use of the aircraft. You can
4 understand that. And so I'm trying to understand, because it
5 arises in a somewhat unusual posture, apparently in the course
6 of negotiation, I'd like you to unpack for me the way in which
7 that specter or that situation from your perspective has
8 arisen?

9 MR. SCHWARTZ: Yes, your Honor. I'll try to be brief,
10 but the issue has arisen because there are these -- this other
11 litigation before Judge Stanton where a claim was asserted,
12 it's a claim for money. And there's the separate transaction
13 in which Carlyle, which your Honor is aware of, which Carlyle
14 took over managing the aircraft and the transfer which is the
15 subject of your opinion yesterday.

16 The parties recognize that they had an ongoing
17 business relationship despite the fact that there was this
18 other litigation pending before them. And so in recognition of
19 that, the parties signed an agreement trying to cooperate to do
20 things that are ordinary course for owners and managers of
21 aircraft, like refinancing, selling the aircraft. And from our
22 perspective, we have been engaging with Frontier for months
23 trying to solve the issue that I think really was -- a fine
24 point was put on it before, which is a collectability issue.

25 Frontier wants to make sure that they have an entity

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1 that's creditworthy to collect against; when, and if I should
2 say, there's a judgment in that first litigation. Now that
3 itself is totally extra-contractual. There's no right under
4 the leases for them to have a judgment credit where the entity
5 for any judgment that they might get under the leases. There
6 are guarantors under the leases, and those guarantors are still
7 there. They are attempting to ask for something that they're
8 not entitled to under the leases. We have been negotiating
9 with them trying to come to a resolution on a reasonable path
10 forward to give them the thing that they're asking for in an
11 efficient way as possible.

12 So, your Honor, one of the things that was briefly
13 mentioned by my colleague is that we did offer to provide them
14 with a creditworthy guarantor that would have -- that would
15 represent and warrant that it would maintain a net worth of at
16 least \$65 million, which is I think well in excess of what a
17 reasonable judgment would be in that first litigation, and it's
18 in excess of what Mr. Fisher said the claim damages are here
19 today. So we've been trying to negotiate with the plaintiffs
20 here to be able to exercise our contractual rights, which are
21 contained in the leases which allow us to in the ordinary
22 course transfer or refinance the aircraft. And these are
23 ordinary course actions that happen everyday that facilitate
24 the airline industry. And so at some point when it just became
25 clear to us what Frontier was doing was not actually trying to

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1 negotiate in good faith with us, but was trying to use the
2 position of the claimed blocking right to try to get leverage
3 in the other litigation, that's when we determined to declare a
4 default, and that's what happened in May.

5 THE COURT: What does it mean though, coming back to
6 the point. I appreciate your giving me that context, but I'm
7 trying to understand. When you declare a default, the
8 plaintiffs say, what follows from that is your ability -- and
9 I'm not sure which of the defendants specifically that would
10 be, but be that as it may, a defendant's ability to deny
11 Frontier the use of the aircraft, grounding it, whatever, the
12 time that follows from the default?

13 MR. SCHWARTZ: Yes, your Honor. That's one of the
14 specific negotiated remedies that Frontier agreed to under the
15 leases; which is if there's an event of default, then we're
16 able to exercise a number of remedies, including those.

17 THE COURT: And the default that you're claiming, the
18 event of default that you have declared, what is the event of
19 default if you will?

20 MR. SCHWARTZ: Your Honor, under the leases that are
21 implicated, Section 20.2A allows us to make certain transfers
22 or assignments and provide mortgages. And 20.2B requires that
23 the lessee, here Frontier, cooperate with us, and everything is
24 subject to reasonableness. But our view is that the roadblocks
25 that have been thrown up are completely unreasonable in light

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1 of some of the things that we offered, which I mention we
2 weren't required to do. So the default is their failure to
3 comply with their obligations under Section 20.2B of the lease.

4 THE COURT: You're saying essentially what it is that
5 they are refusing to do is, they're refusing to allow you to
6 transfer the ownership? I'm just trying to understand what it
7 is that you contend was unreasonable.

8 MR. SCHWARTZ: Two things. So to either sell the
9 aircraft or to refinance them, there are certain consents or
10 acknowledgments that we need from Frontier as the lessee; for
11 example, a consent to a security assignment. That is the kind
12 of thing that we bargained for the right for them to cooperate
13 both in the lease, and I should also say in the non-waiver
14 agreement which we executed separately. And their refusal to
15 do that is what is the default.

16 THE COURT: I see. And so from your perspective,
17 without getting too much in the middle of the negotiations, but
18 they are alas what brought us here, so I think I need to, from
19 your perspective, as long as you can give Frontier the economic
20 protection enough to capture any money damages claim if you
21 will, it would be unreasonable for them to decline to consent
22 to the transfers you have in mind. And because you feel
23 they're being unreasonable in turning away your attempts to
24 give them economic assurance, that's why you declared the
25 default. Am I roughly getting that right?

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1 MR. SCHWARTZ: That's correct, your Honor. And if I
2 could just add one thing. The leases themselves don't, for
3 example, give Frontier priority right to enforce a judgment
4 against the subject aircraft. So they would be an unsecured
5 judgment creditor just like anyone else would. So trying to
6 tie their right to execute on any potential judgment they may
7 get to the transfer of the aircraft or consenting to the
8 assignment of the aircraft is unreasonable.

9 THE COURT: Okay. I think I understand that.
10 Mr. Schwartz, I think it's appropriate for me to get a little
11 more into the negotiations here, even though ordinarily as the
12 judge presiding over a litigation, I'm weary of doing that
13 unless people want me to be a settler, which is not my role
14 here. But I think unavoidably it's mixed up with the issue of
15 irreparable harm, so I take it you're not going to block if I
16 push this a little deeper, right?

17 MR. SCHWARTZ: No, your Honor.

18 THE COURT: All right. Look, if the threat of taking
19 away the aircraft hangs over the plaintiff, you can understand
20 just in a real world way why that would have potentially
21 dispositive impact on negotiation. Frontier doesn't want to
22 become Southwest. Let me put it that way. And if you take
23 away, even because you believe you have a contractual right to
24 do so, their access to these planes and ultimately you've got
25 the imagery that we saw last Christmas with Southwest with

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1 Frontier or anything like it, you can understand why that
2 brings them to the table basically surrendering promptly.
3 Pause right there. I may have been a little bit overdramatic
4 in imagery, but you get the point. It's not unreasonable to
5 say from their perspective, whether or not you're behaving --
6 whether or not you're appearing on the merits is right, the
7 effect of the threat of taking away the aircraft is a massive
8 maybe existential threat for Frontier, right? Is there
9 something wrong with that portrait?

10 MR. SCHWARTZ: Your Honor, I don't think you're using
11 "threat" pejoratively. I just want to make clear, we didn't
12 come to this decision lightly.

13 THE COURT: No. No. I know. Look, I use to have
14 clients too, and I totally understand that "threat" is not
15 meant pejoratively, but if default carries with it the right to
16 take away the aircraft, whatever we use instead of threat, the
17 specter in the scenario, whatever you call it, as a practical
18 matter, that's something Frontier effectively has to avoid. Is
19 that an unreasonable way for me to perceive that piece of the
20 situation?

21 MR. SCHWARTZ: Your Honor, based solely on what I've
22 heard from Mr. Fisher and Mr. Schoeggl, it sounds like that's
23 the case. What I would say is, that's the right that they
24 specifically bargained for to give us. These are sophisticated
25 parties who agreed.

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1 THE COURT: Let me ask you this question, supposing
2 that for argument sake during the limited period defined by a
3 TRO, you are disabled from that remedy and that remedy alone;
4 in other words, the access to the planes would be unimpeded,
5 but I wouldn't be meddling in any other way; but with Frontier
6 understanding that the effectiveness now being a justiciable
7 issue, litigation on this may quicken, how realistic is it do
8 you think that the parties can get the "yes" during the next
9 couple of weeks, assuming that the threat during those couple
10 of weeks to the airplanes goes away?

11 MR. SCHWARTZ: Your Honor, what I would say is,
12 without saying anything about the specifics, I do understand
13 that there had been in the past some settlement discussions
14 that I was not part of. I would imagine there would be
15 willingness to try to work it out, but I haven't had a chance
16 to talk to my client about that.

17 THE COURT: All right. Mr. Schwartz, there is an
18 illusion in your papers to the possibility that -- let me start
19 that again. I believe your papers suggested that the relief
20 that Frontier seeks in the TRO is overbroad insofar as in
21 theory there could be some independent default that is
22 unimpeded that really doesn't arise out of these circumstances;
23 and the relief sought of categorically precluding interference
24 with the airplanes might not capture that sort of situation if
25 you get what I'm saying.

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1 I take the point in theory, but realistically is there
2 some other default you have in mind beyond the theoretical
3 possibility that a completely independent default could occur?

4 MR. SCHWARTZ: No. And, your Honor, candidly, I wasn't
5 clear if we were appearing today solely on a TRO or if this is
6 going to be potentially a preliminary injunction hearing or
7 what it might be. What I was concerned about is some extended
8 order that may go on for however long that doesn't account for
9 what could happen in the future. I think the chance that of it
10 happening in 14 days is significantly lessened.

11 THE COURT: OK. That might be a down the road issue.
12 All right. Let me come back to you, Mr. Fisher, with just one
13 discrete issue with respect to the merits. The defense said
14 that, in its papers, that insofar as the lawsuit before me was
15 filed in 2022 -- somebody should mute their phone. I'm hearing
16 an ambulance or something like that in the background.

17 The defense says, Mr. Fisher, that in effect the
18 default notices aren't really part of the lawsuit filed before
19 me in 2022. The relief that's sought here is, seems the scope
20 in effect of the litigation. What's your brief response to
21 that?

22 MR. FISHER: Your Honor, two points. We brought this
23 emergency relief before the Court in the pending action
24 22 Civ. 02943 because it involves the same parties, the same
25 aircraft and the very same lease provisions that were the

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1 subject of your Honor's decision yesterday. We thought for
2 practical reasons that made the most sense rather than going to
3 a part one judge who's entirely unfamiliar with the parties and
4 the issues. These are related issues that are related to the
5 issues before your Honor. And I would add that the fact that
6 Carlyle filed a separate action specifically on the question of
7 the validity of the notices of default and the implications of
8 the notices of default which has been removed and which your
9 Honor accepted as a related case makes it appropriate for this
10 Court to be the Court to address this motion and the relief
11 requested.

12 THE COURT: Let me ask you this, supposing that your
13 claim in the existing case before me of a contract breach were
14 validated, that it turned out that you were right about that,
15 would it necessarily follow that the defaults that have been
16 claimed by the defense are invalid?

17 MR. FISHER: It would not necessarily follow, your
18 Honor. I do appreciate that these are events that developed
19 since the amended complaint before the Court. I think that we
20 very well could have and likely would have thought leave to
21 amend the pending complaint in order to bring before the Court
22 claims related to these notices of default. And frankly before
23 we could even do that, Carlyle filed an independent lawsuit in
24 state court raising all of those issues.

25 THE COURT: OK. And with that now before me, I take

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1 it, although they are the plaintiff, if you will, in the new
2 removed related case, it's safe to assume that putting aside
3 whatever might happen injunctively, either that case on its own
4 terms or a marriage-imaged declaratory counterclaim effectively
5 brings these same issues before me?

6 MR. FISHER: Absolutely, your Honor. As I read their
7 complaint, there's no way to adjudicate the issues in that
8 complaint without deciding whether or not Carlyle properly
9 issued these notices of default.

10 THE COURT: OK. Mr. Schwartz, let me come back to you
11 just on a balance of the equities issue. Now that you
12 understand that I perceive the Ask here as limited to a TRO.
13 There's literally no way, folks, that I'm going to grant a PI
14 in the timeframe here over the phone with the limited
15 opportunity the defense in particular has had to brief this.
16 We're really talking about a TRO-type window here.

17 With that understanding, Mr. Schwartz, what's the harm
18 on your side of the house, if I'm talking about the balance of
19 the equities? I've had an extensive discussion with both of
20 you about what might happen to Frontier. During this 12-14 day
21 window, depending on when the hearing would be, is there
22 irreparable harm to you?

23 MR. SCHWARTZ: Your Honor, I think if it's truly a
24 narrow window of 10 to 14 days, I don't think any harm would be
25 irreparable. We would continue to be harmed economically, but

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1 I don't think it's irreparable.

2 THE COURT: And I take it you're not disputing that
3 whatever harm economically you might suffer during the
4 hypothetical two-week period, Frontier's got the deeper pockets
5 to pay?

6 MR. SCHWARTZ: I will take Mr. Fisher at his word. I
7 don't have a basis to dispute that.

8 THE COURT: Counsel, here's what I'm going to do.
9 We've been on the phone for a while. I want to take about 30
10 minutes just to collect my thoughts and then come back on the
11 line. But I want to just pause and say a couple of things.
12 First of all, this has been an exceedingly helpful discussion
13 for me in clarifying what's going on here. Both of you are to
14 be commended just for your responsiveness, and I want to say a
15 special thank you to you, Mr. Schwartz, because in several
16 points in the last exchange, your candor with the Court has
17 been noted and really appreciated.

18 I'm trying to solve a problem here and do it in a way
19 that is consistent with everybody's interest. I'm trying to
20 exercise such authority as I have here in a narrow judicious
21 way, but I'm always assisted when I have counsel who respond
22 with nuance and care. And I appreciate the acknowledgments
23 you've made about what the scope of the damage to your client
24 if a remedy here were conceived of as a two-week remedy or
25 less. That has been helpful to me, and I don't always have

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1 counsel who are as candid as you've been and I want to give you
2 a shout out and thank you for that.

3 Counsel, here's what I'd like to do. It's 4:10 p.m.
4 Why don't counsel get on the line again at about 4:35 p.m. I'm
5 likely to be about five minutes later so that my law clerk can
6 take the role. Everyone including the court reporter should be
7 back on the line at 4:35, and I will likely join five minutes
8 later. Thank you all. I will remotely see you shortly. Thank
9 you. We stand adjourned.

10 (Recess)

11 THE COURT: Welcome back, counsel. This is Judge
12 Engelmayer. This is the case of *Frontier Airlines, Inc. v.*
13 *AMCK Aviation Holdings, et al*, 22 Civil 2943.

14 Mr. Fisher, are you and your team on for Frontier?

15 MR. FISHER: Yes, we're here, your Honor.

16 THE COURT: Mr. Schwartz, are you and your team on for
17 the defendant?

18 MR. SCHWARTZ: Yes, your Honor.

19 THE COURT: And perhaps most important of all, is our
20 court reporter back on the line?

21 COURT REPORTER: Yes, your Honor. I'm here.

22 THE COURT: Very good. Counsel, here it goes.

23 I am now prepared to rule. For your planning
24 purposes, there will not be a written decision. I will instead
25 issue a bottom-line order reflecting the Court's resolution of

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1 plaintiff's motion. To the extent the Court's reasoning is
2 significant to counsel, you will need to order the transcript
3 of this hearing.

4 As background, this case was filed and assigned to me
5 in April 2022. After amending its initial pleadings twice,
6 Frontier brought three sets of claims against numerous
7 defendants, only some of whom are named in the petition for
8 emergency relief. These claims related to lease agreements and
9 other contracts for 15 commercial aircraft. Defendants moved
10 to dismiss all claims.

11 In an opinion issued late yesterday, the Court
12 resolved those motions to dismiss. The Court granted the
13 motions to dismiss plaintiff Frontier Airlines' declaratory
14 judgment and fraudulent transfer claims, but denied the motion
15 to dismiss as to the breach of contract claim. As stated in
16 that decision, the parties are to submit to the Court a case
17 management plan by June 15, 2023.

18 Yesterday before that opinion was issued, Frontier
19 filed a petition for a temporary restraining order and
20 preliminary injunction, pursuant to Rule 65 of the Federal
21 Rules of Civil Procedure. The TRO or PI would enjoin
22 defendants Wells Fargo Trust Company, N.A. ("Wells Fargo") and
23 UMB Bank, N.A. ("UMB") as owner trustees, from impounding,
24 grounding, and/or deregistering the 14 aircraft that were the
25 subject of default notices served by defendants on May 26,

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2023, or from terminating the aircraft lease agreements or exercising other default remedies for those 14 aircraft.

Yesterday afternoon, the Court ordered that until Frontier's application for an injunction is decided by this Court, defendants were restrained from impounding, and/or deregistering the 14 aircraft, or terminating the lease agreements for any of the 14 aircraft. The Court simultaneously scheduled this telephonic conference and directed defendants to file any opposition to the petition this morning and the defendants did so.

Also yesterday afternoon, the Court accepted as related to this case, another case, between Carlyle and Frontier, alleging claims of breach of contract and tortious interference with prospective economic advantage arising out of Frontier's refusal to provide the requested consents. The Court held a telephonic conference this afternoon, at which the Court largely put questions to counsel about the application to the facts here of the standards for emergency relief.

The following is my ruling: To justify a preliminary injunction under Federal Rule of Civil Procedure 65, Frontier must demonstrate: (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a sufficiently serious question going to the merits to make them a fair ground for trial, with the balance of hardships tipping decidedly in its favor; and (3) that the public's interest

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weighs in favor of granting the injunction.

Here, as I presently understand the situation, Frontier seeks to preserve the status quo. That is so insofar as Frontier is seeking to continue to be able to use the leased aircraft, while it continues to pay rent and comply with all lease obligations. I say that understanding that there is unresolved and genuine disputes between the parties as to whether Frontier conduct is reasonable and therefore consistent with the parties' agreement in attaching conditions to its consent to the transfers of the aircraft that defendants propose. The point here, for legal terms governing the standards is that Frontier is seeking a prohibitory injunction seeking only to maintain the status quo, such that the application of the above factors is more relaxed than the "more stringent" standard for a "mandatory injunction." I cite for the proposition on those standards, *Cachillo v. Insmad, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011), *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010), and *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286 (2d Cir. 2012), for these familiar standards.

Briefly as to the factual background, I have reviewed in detail the parties' memoranda of law, supporting declarations, and the materials attached to those declarations. Those include plaintiff's memo at Dkt. 53 and defendants' memo at Dkt. 63. The relevant facts include the follows: Frontier

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1 and Carlyle have been in ongoing negotiations after the June
2 and November 2022 transactions that resulted in the security
3 assignments of the aircraft.

4 Frontier claims that it could not acknowledge the
5 assignments without prejudice and costs. It claims that were it
6 to acknowledge the assignments, it would be, in effect,
7 abandoning its existing claims that AMCK had earlier wrongfully
8 transferred the aircraft to Carlyle in the first instance, that
9 doing so would undermine Frontier's perceive to be its valuable
10 claims in this action and its ability to collect on a judgment
11 in another action pending before Judge Stanton. And Carlyle
12 have exchanged various offers to protect against this issue,
13 but their negotiations have failed to reach fruition.

14 While these negotiations were ongoing, on April 27,
15 2023, Carlyle sent Frontier a letter asserting that Frontier by
16 not assenting to the transfers had breached its obligations
17 under each lease and an agreement executed after the transfer
18 from AMCK to Carlyle. On May 3, 2023, Frontier responded
19 correcting what it contended were misstatements in Carlyle's
20 letter, in its view, correcting what it contended were
21 misstatements in Carlyle's letter and expressing an interest in
22 continued negotiate towards mutually agreeable terms. On May
23 26, 2023, Carlyle served Frontier with a notice of default on
24 all 14 leases. That began a 15-day cure period after which
25 default can be formally be declared by defendants. This

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1 Saturday, June 10, 2023, would be the final day of that cure
2 period. On June 5, 2023, three days ago, Carlyle filed suit
3 against Frontier in New York Supreme Court. Frontier again
4 removed that to federal court on the basis of diversity
5 jurisdiction, and again I have accepted that case as related.
6 So that's the broad strokes 30,000 foot background.

7 Turning to the injunctive standards, and I'll begin
8 with irreparable Harm. Frontier has met its burden to
9 establish irreparable harm with respect to certain of the
10 possible actions available to the lessor under the aircraft
11 leases following a default by the lessee. Two of these possible
12 actions are: "grounding of the Aircraft" and "cancelation of
13 the leasing of the Aircraft and requiring return of the
14 Aircraft to Lessor."

15 Frontier has represented, and I for the purpose of
16 this ruling credit, that the aircraft represents about 10% of
17 its fleet. It estimates that about 12,000 people in total fly
18 on the 14 aircraft everyday during the summer months. The
19 Court is persuaded that grounding the aircraft -- and
20 presumably canceling hundreds of flights -- would irreparably
21 damage Frontier's reputation, good will, and business
22 opportunities.

23 From my colloquy with Mr. Schoeggl in particular, I am
24 persuaded that Frontier could not accommodate the flights that
25 would take place on those 14 aircraft with the existing fleet

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1 and then alternative aircraft are not readily available to
2 Frontier. So were Frontier denied access to 14 aircraft by
3 virtue of defendants exercising their rights under the default
4 notices, there could be existential disaster for Frontier, with
5 thousands of injured, presumably enraged passengers protesting,
6 and on the media during the summer months, whom Frontier would
7 under that circumstance have either canceled upon and/or
8 stranded, Frontier could have what we all understand could be a
9 Southwest Airlines situation on its hands.

10 Even if that problem got solved quickly, it is
11 reasonable to infer that the reputational harm would linger.
12 And the situation would also potentially inconvenience
13 thousands of Frontier's customers who have purchased tickets,
14 who have vacations or other important things to go to, and who
15 are presumably relying on the imminent scheduled flights for
16 their travel. And although as a legal matter the impact on the
17 customers on its own terms speaks really to the public's
18 interest, and not directly to the aspect of the equation,
19 indirectly it speaks to irreparable harm, insofar as damage to
20 Frontier's goodwill with customers stands to hurt Frontier, I
21 find, irreparably. I also find that the harm is sufficiently
22 imminent. Defendants have not, sermon like, foresworn the
23 default remedies to ground or retake the aircraft, and
24 defendants therefore could do so as early as this weekend.
25 Bottom line, this is not a close question as to irreparable

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1 harm. It's a case in which irreparable harm has clearly been
2 shown by the movant, Frontier.

3 I also find that the balance of equities and hardships
4 weighs not just tipingly, but decisively in Frontier's favor.
5 On the Frontier side of the equation, absent relief, Frontier
6 faces a reputational and economic disaster with implications
7 for years to come were defendants to carry through on the
8 threat that is explicit in the default notices.

9 On defendants' side of the equation, provided that the
10 injunction were short-term, as in limited to the span of a TRO,
11 which is limited by statute to 14 days, defendants candidly
12 acknowledge that the impact on them would be, during a TRO
13 length, purely economic. It is undisputed further that
14 Frontier has the ability to pay. And to the extent there's any
15 doubt about it, the bond that the Court has been asked to
16 impose would provide a reassurance. I therefore find that the
17 prospective potential injury to Frontier by way of the fallout
18 from likely flight cancellations quite significantly outweighs
19 the injury to defendants from the grant of a short-term
20 emergency relief.

21 Now, as to the likelihood of success. Based on the
22 very limited portrait I have been given, I cannot find a
23 likelihood of success on Frontier's part. Frontier may or may
24 not have a winner of a claim for historic economic damages
25 either in the surviving portion of the case before me or before

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1 Judge Stanton. Frontier may or may not have a winner of a
2 claim that the demands it's making as a condition of assenting
3 to the transfers are reasonable.

4 It is simply premature for me to make a firm
5 assessment of that. The best assessment I can give you -- and
6 again my visibility -- given the weather outside in New York
7 this metaphor is particularly apt, my visibility here is very
8 limited, so this should not be taken as a durable assessment at
9 all, it is that each side has articulated plausible arguments
10 that suggest that these claims could be resolved either way.
11 That does not mean that one of you doesn't have a clearly
12 better argument. It's that based on where things stood before
13 me at this early stage, I'm unable to see that, and therefore
14 with limited visibility size this up as a case that could come
15 out either way. It is entirely possible that by the time we
16 got to a preliminary injunction hearing with fuller briefing
17 and more opportunity for assessment and reflection, I would
18 assess this as different. Where I sit now, this is a fair
19 question for the merits.

20 I am not persuaded though for the record by
21 defendant's argument that the request for emergency relief is
22 too far afield from the existing claims in this or the related
23 case to be viable. In particular, the validity of the default
24 notice is squarely implicated by the related case, which may
25 well in time come to include counterclaims about these very

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1 notices brought by Frontier. Bottom line, I find as to
2 likelihood of success on the merits a fair question on the
3 merits that could come out either way.

4 Finally as to the public interest. The public has an
5 obvious clear interest in favor of the grant of emergency
6 relief to prevent the planes from being de-accessed by
7 Frontier. Domestic air travel is vitally important to the
8 national economy. It's also vitally important to the people on
9 the planes and to their loved ones. Thousands of members of
10 the public would be impacted by flight cancellations standing
11 from impoundment of the 14 Aircraft. To say the least, the
12 Court is unpersuaded by the defendants' argument that "because
13 airline passengers are already familiar with flight delays and
14 cancellations, which are routine in the age of air travel," the
15 public lacks an interest in favor of the injunction. Just
16 because a person's been punched in the face once, doesn't mean
17 they don't have an interest of not being punched in the face a
18 second time. The public has an obvious interest in not being
19 subjected to cancellations, especially where brought about by
20 what have arguably been contended to be breaches of contract.

21 Bottom line putting all the factors together, I find
22 the standard for temporary restraining order met, and I will
23 therefore grant Frontier's relief consistent with the limited
24 life cycle of a TRO, which is up to 14 days. And specifically
25 I intend the TRO to last until our next conference, which I'm

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1 going to schedule in 12 days, not 14. And that is because, as
2 you'll appreciate, 14 days would put us in the middle of
3 another telephonic hearing, because that would land smack-dab
4 in the middle of the Second Circuit judicial conference. I'm
5 hopeful that counsel would resolve the matter before then. But
6 if not, we're going to be meeting in person, and here is the
7 schedule on which we will be meeting.

8 Specifically if the case has not resolved itself by
9 then, or at least the need for emergency relief, the Court will
10 hold an in-person hearing in my courtroom, courtroom 1305 in
11 the Thurgood Marshall courthouse at Foley Square, New York, New
12 York 10007 at 9:30 a.m. on Tuesday, June the 20th. And to
13 assist the Court on the preliminary injunction determination,
14 because that would then be the question, whether to extend or
15 modify the TRO or to turn it into a preliminary injunction, I'm
16 going to commission briefing on the following schedule. And
17 I've chosen the dates here so as not to interfere with
18 anybody's Father's Day and not to have any brief due on
19 Juneteenth.

20 Frontier's opening brief is due Monday, June 12th at 5
21 p.m. Defendant's response is due Thursday, June 15th at 5 p.m.
22 That also is the day in which the proposed joint case
23 management plan is due. And Frontier's reply is due Saturday,
24 June 17th at 5 p.m. Again, I'm giving you, Frontier, only two
25 days for the reply because I'm thinking of the fathers, and

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1 procedurally those of the younger lawyers on the case. I want
2 to make sure that we're not interfering with anybody's Father's
3 Day.

4 The Court will use the conference on June 20th to rule
5 on the preliminary injunction, as well as for the purposes of
6 an initial pretrial conference. Insofar as the Court in the
7 original case before me has now resolved the motion to dismiss,
8 even had we not had the intervening application for emergency
9 relief, we would be meeting in short order to set a discovery
10 schedule. It stands to reason, counsel, if you are unable to
11 resolve the emergency relief request, you should assume that
12 I'm going to be setting a very rapid schedule in the case. You
13 should also assume that I will want to use the conference to
14 rope in all claims, including amended complaints in the case.
15 And I'm assuming that in the context of the new case, but not
16 the existing one, in the new case dealing with the default
17 notices. I'm assuming there's some likelihood that one or both
18 parties may want to amend. I'm going to ask all of you to work
19 together to come up with a rationale schedule for all that.

20 The point I'm trying to make here is that while we're
21 all here together, we ought to get the business of case
22 management done, and it will be important for me to get an
23 understanding of the full shape of the case at that conference.
24 The scope of the injunction is essentially intended to track
25 exactly what was in the order I issued yesterday, in that it's

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1 going to prevent the defendants from grounding, impounding
2 and/or deregistering the aircraft or terminating the leases for
3 the aircraft.

4 And I'm going to order as well that Frontier post a \$2
5 million bond, recognizing that Frontier is not likely to go
6 under in the next several days, I will give Frontier till next
7 Tuesday to do that. I think the defendants can live with the
8 risk presented by not having a bond in place by next Tuesday.
9 All right. That ends the ruling. I wanted to now pivot to
10 what I would submit is really the real issue here, which is
11 getting you to settle this thing.

12 First of all, I want to remind you that you have
13 Magistrate Judge Sarah Netburn assigned to this matter. Judge
14 Netburn has successfully settled cases way more complicated
15 than this before me, and she is a fantastic settler. You're at
16 liberty to try to settle this yourselves. You're at liberty to
17 try to use a third-party, but she is assigned to the case and
18 is a wiz at settling cases.

19 I will ask you in a moment, counsel, whether you are
20 interested in my referring this to Judge Netburn for settlement
21 purposes. If there's mutual interest in doing that, either on
22 the phone now or in a follow-up note to me, to my chambers, I
23 will immediately refer to this to Judge Netburn for settlement
24 purposes. Beyond that, speaking as the neutral on the call, I
25 have to say to you, counsel, that this presents as an

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1 unbelievably settleable case. There do not appear to be a lot
2 of variabilities here. I am not hearing Frontier saying that
3 the identity of the entities to be transferred is somehow
4 noxious or not being asked to associate with people whose
5 ideologies or world views or ability to pay are problematic.
6 There's no suggestion that the safety of the aircraft is
7 implicated.

8 Frontier's principal interest here appears to be
9 assuring that it's ultimately able to collect a judgment on
10 what amount to what it contends are historical law. There's a
11 way to resolve that, counsel.

12 And from the perspective of defendants, they have from
13 their perspective an interest in the ability to freely alienate
14 the aircraft here, to transfer them. I am not your settler
15 here, but I am trying to take advantage of my presence here to
16 say to you that, while I'm sure it's a little more to it than
17 that, when all is said and done, each side at least in the
18 papers and on the call has articulated a complete
19 understandable interest. And rationale and mature counsel
20 should be able to work this out.

21 If you're unable to work it out, you're going to wind
22 up in a situation where 12 days from now when we meet,
23 depending on the briefing I get, this could come out in either
24 direction. It could come out in defendants from your
25 perspective, what you don't want, which is a more longer term

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1 prohibition on grounding the aircraft and so forth. And
2 Frontier from your perspective, it could result in the
3 elimination and non-extension of the TRO. I can't forecast
4 that, but each of you has a downside that you don't want here.

5 In your hands more than mine is the ability to resolve
6 this. I'm suggesting to you that with the benefit of almost 12
7 years experience on the beach, there are cases that leap off
8 the page as capable of settlement bond for clients. And I'm
9 counting on you, Mr. Fisher, and your team, and you,
10 Mr. Schwartz, on your team to grab your respective clients by
11 the lapel and tell them that the judge's regarding this of a
12 case that ought to be settled. And that it would be a waste
13 of -- it would be regrettable, not to mention a waste of
14 lawyering fees and quite a needless risk taken for this not to
15 be resolved, the request at least of emergency relief as of our
16 conference.

17 So I'm going to ask counsel to undertake hopefully
18 guided by yesterday's decision, and most of all today's
19 remarks, to try to resolve this. Whatever the merits of the
20 underlying dispute for money, the dispute that's brought us
21 here together involving the threat to reclaim the aircraft,
22 this is one that mature clients ought to resolve. I want you
23 to please drive home to your clients that the Court feels with
24 considerable strongness that if this case doesn't resolve
25 itself within 12 days, something has gone dreadfully wrong.

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1 With that let me just ask you, Mr. Fisher, whether
2 you're prepared to say now whether your client wants me to
3 refer the case to Magistrate Judge Netburn for settlement?

4 MR. FISHER: Your Honor, we appreciate and take to
5 heart the admonition to work hard, and we will. I would really
6 need to consult with my client before I can agree to a referral
7 to Magistrate Judge Netburn, although I personally think it
8 would be a very good idea. I don't have my client's authority.

9 THE COURT: Fair enough. Mr. Schwartz, same answer?

10 MR. SCHWARTZ: Yes. And, your Honor, may I suggest
11 that we each confer with our clients and then submit a letter
12 to the Court no later than tomorrow.

13 THE COURT: That's fine. And needless to say, while I
14 hope you'll both agree to it, or alternatively have some other
15 settler in mind, if you want to choose a private settler,
16 that's great too. I just want you to have somebody to help you
17 get over the goal line here. If by chance there's some
18 disagreement as to referring this to Judge Netburn, I don't
19 want to know who declined. Just write me a letter to say that
20 there is not mutual interest, but don't shame the person who
21 didn't assent. That's not information that's useful to me, and
22 it's not behavior I like.

23 Let me go around the horn and see if there's any other
24 way I can be useful to you. Mr. Fisher.

25 MR. FISHER: Yes, your Honor. Two issues. One is

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1 scheduling accommodation. I am a Sabbath observer. For that
2 reason, the June 15th, 5 p.m. deadline for our reply brief
3 poses a problem.

4 THE COURT: June 17th.

5 MR. FISHER: I'm sorry, June 17th, a Saturday. I'm
6 sorry. Yes, I misspoke.

7 THE COURT: Nonetheless, I take the point. Look, I
8 mean, here's the question. The problem is that the next day is
9 Father's Day. I was trying to be nice and avoid Father' Day
10 and so forth, and I want to be. What are you proposing?

11 MR. FISHER: Your Honor, I very much appreciate that.
12 I would suggest the Sunday of Father's Day at 10 a.m. or 12
13 p.m. I have a team, but I won't be able to review the brief.

14 THE COURT: Look, I will let you file it at 10 a.m. on
15 Father's Day on June 18th instead. I'll change that, but I'm
16 deliberately making that a hard stop because I have some sense
17 of what life in a big firm is like, and I do not want a bunch
18 of people grinding on a brief on Father's Day that could have
19 been knocked out earlier. If you get it in at 10 a.m., at least
20 everyone can have a good day. Does that do the trick?

21 MR. FISHER: Yes, I will make sure that happens of
22 course. And the other, I hope that the Court will take in the
23 spirit in which it is intended. I wanted to address the bond
24 very briefly because during --

25 THE COURT: Mr. Fisher, you need to speak a little

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1 more close to the phone. You're fading in and out.

2 MR. FISHER: My apologies. I wanted to very briefly if
3 your Honor will entertain it address the amount of the bond.

4 THE COURT: No. No. Mr. Fisher, no. I've
5 accommodated you in holding this conference today in a host of
6 ways. I engaged with you. You may have something else you'd
7 like to say. Frontier Airlines can post a \$2 million bond, and
8 I'm not going to chew up more time about that. You had a
9 chance to speak with me about it. Enough.

10 MR. FISHER: Understood, your Honor. Nothing further.

11 THE COURT: Look, I don't doubt that if we went into
12 it in more detail, you'd have more to say, but at some point
13 the conversation needs to end, and that is not ultimately --
14 we're talking about the posting of a bond, not the
15 relinquishment of \$2 million. Frontier can pay for the
16 privilege.

17 MR. FISHER: Understood, your Honor.

18 THE COURT: All right. Anything further, Mr. Fisher?

19 MR. FISHER: Nothing from me.

20 THE COURT: How about you, Mr. Schwartz?

21 MR. SCHWARTZ: Nothing, your Honor. Thank you for
22 your time.

23 THE COURT: Of course. Look, I do want to again just
24 pause again and by complimenting the lawyering, both in writing
25 and on the phone today did an excellent job by your clients and

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1 they're lucky to have you. I want to make sure that you are
2 conveying to your clients in no uncertain terms that this is a
3 case that should settle.

4 And in a rationale world -- and again, I'm focusing on
5 the emergency aspect of it, not the underlying backwards
6 looking monetary claims. This ought to be a resolvable piece.
7 And I want your clients to understand that the Court would look
8 with considerable dismay at intransigent by clients that
9 prevent readily, settleable, resolvable disputes, that which is
10 given rise to emergency relief being requested. I would regard
11 that as incredibly regrettable, and I want you to convey that
12 in no uncertain terms to the clients. I know lawyers sometimes
13 get that sort of piece in a way that clients don't, that's why
14 I'm highlighting it emphatically as I can. Be well, everyone,
15 and I look forward to seeing you all, in any event, for our
16 case management conference on June 20th. Even if the emergency
17 relief part is done, I'll still meet with you to talk about the
18 trajectory of the litigation going forward unless you are able
19 to resolve that as well, which of course will be wonderful. Be
20 well. I see you soon. We stand adjourn.

21 (Adjourned)
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25